Petition

81-1202

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN WATERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. Whether the evidence was sufficient to support defendant's convictions of conspiracy to import narcotics and use of a passport obtained by false statement in the absence of direct proof, *inter alia*, of defendant's presence in the Eastern District of New York or actual use of the passport in question.

2. Whether the trial court should have excluded wiretapped telephone recordings obtained by West German authorities not in compliance with Title III (18 U.S.C. § 2510 *et seq*) or the Fourth Amendment.

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JOHN WATERS,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John Waters respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals (Moore and Newman, JJ., Tenney, D.J.) (Appendix, *infra*) is not reported.

Jurisdiction

The Judgment of the Court of Appeals was entered on October 28, 1981 (Appendix, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i) and Rule 20.1 of the Rules of this Court.

Constitutional Provisions and Statutes Involved

Constitutional Provision:

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes:

Title 18 United States Code § 1542: *False statement in application and use of passport:*

* * *

> Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

Title 18 United States Code § 2515: *Prohibition of use as evidence of intercepted wire or oral communication:*

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Title 18 United States Code § 2518: *Procedure for interception of wire or oral communications:*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular

description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

• • •

Statement of the Case

Petitioner was convicted after a jury trial before the United States District Court for the Eastern District of New York (Mishler, J.) of conspiracy to import narcotics and use of a passport obtained by a false statement, in violation of 21 U.S.C. § 963 and 18 U.S.C. § 1542. Petitioner was sentenced to concurrent terms of fifteen and five years imprisonment on the respective counts as well as fined $25,000 on the conspiracy count. The conviction was affirmed by the United States Court of Appeals for the Second Circuit.

Indictment 80 CR 560, filed in the Eastern District of New York on October 23, 1980, charged John Waters with

conspiracy to import narcotics during the period of June 1978 through March 1979 in the Eastern District of New York and elsewhere. Count Two charged Waters with using a passport secured by means of a false statement on January 21, 1979 within the Eastern District of New York.

The Government's case was presented principally through the testimony of Salah Dalki, a Jordanian national who lived in Frankfurt, Germany during the years 1974 through June 1979, when he returned to Jordan and subsequently was arrested by local authorities for heroin smuggling.*

Dalki, a previously convicted narcotics trafficker, testified to having first met John Waters in the summer of 1978 in Frankfurt, Germany when they were introduced by a mutual friend, John Adoo. According to Dalki, Adoo told him about an American friend named Joe who sought to purchase heroin. Adoo at that time introduced Dalki to "Joe", whom Dalki subsequently identified as Waters. Thereafter, in December 1978, Dalki drove to Turkey, purchased seven kilograms of heroin and returned to Frankfurt. Upon his return, Dalki spoke to Waters by telephone, asking him to come to Germany to consummate the transaction.

According to Dalki, Waters arrived in mid-January 1979 and stayed at the Holiday Inn in Frankfurt. Dalki visited Waters in his room at the Holiday Inn and they are alleged to have thereupon negotiated the purchase of three kilograms of heroin for $118,000.

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* Dalki, an international heroin and hashish trafficker wanted by authorities on three continents, was arrested by Jordanian authorities for heroin smuggling. His testimony in the instant case was procured through a tripartite cooperation agreement whereby German, Jordanian and American authorities agreed not to prosecute him in return for his testimony.

Dalki's only subsequent contact with Waters was an overseas telephone conversation, allegedly with Waters, on March 20, 1979, which was surreptitiously wiretapped by West German police authorities, unbeknownst to Dalki. According to the tape recording played for the jury, the caller asked Dalki whether he wanted an American passport.

Dalki's testimony, however, was hardly the last word in credibility. On cross-examination, he admitted having repeatedly lied to the Jordanian and German authorities and confessed that memories of the statements he made to Jordanian authorities with regard to his involvement with Waters were outright fabrications. Indeed, the Government conceded his various fabrications.

Under the circumstances, then, given Dalki's admissions of outright perjury, his uncorroborated testimony was hardly the last work in credibility. In order to thus buttress its less than overwhelming proof of Waters' direct involvement, the Government introduced collateral evidence by which it sought inferentially to demonstrate Waters' involvement in conspiracy alleged herein.

United States Customs Officer Thomas Nolan testified that on January 21, 1979, he met a Pan American flight arriving at Kennedy Airport from Frankfurt, Germany, intercepted two females from the flight, Mary Louise Edwards and Cynthia Conway, searched them and found packages of heroin on them. He also testified that on that particular flight, customs records reveal that among the passengers was listed James Elder, Jr. The Customs officer did not, however, interview Elder and had no specific recollection of him.

Antonio Speranza, a Pan American records supervisor, testified that, according to the company's records, Caren Taylor flew from New York to Frankfurt on January 16, 1979 and Cynthia Conway, Louise Edwards and James Elder flew from New York to Frankfurt on January 17,

1979. In addition, hotel records from the Holiday Inn and Intercontinental Hotel in Frankfurt indicated that Caren Taylor, Cynthia Conway and Mary Edwards arrived in Frankfurt on January 17 and departed on January 21, 1979. No records indicated the registration of a James Elder, Jr.

Finally, Florence Kumork, a passport adjudicator for the New York Passport Office of the Department of State, identified a passport application and photographs of one James Elder, vouched for by Mary Louise Edwards, which she accepted and issued on or about January 15, 1979.*

The Government, thus, presented no direct corroborative evidence that John Waters either was in Germany during the time periods alleged by Dalki nor that he ever even boarded a Pan American flight at Kennedy Airport to or from Frankfurt. Nor, for that matter, did the Government ever present any direct corroborative evidence that Waters ever was present in the Eastern District of New York at any time during the operative period of the conspiracy alleged herein. The only proof presented, then, were ticket vouchers and customs documents indicating that a James Elder was present. No direct proof, however, was presented that it was Waters who, in fact, used the tickets, boarded the plane or went through Customs (or for that matter, was ever present in the Eastern District of New York).

By contrast, the defense presented the testimony of Lester Burnett, a friend and business acquaintance of the defendant, who testified that on both January 15, 1979 and January 19, 1979—during which period Waters allegedly was in Frankfurt with Dalki—Waters was, in fact, present

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* It was noted in colloquy at trial that the venue of the Passport Office was located in the Southern District of New York and, thus, that the gist of the offense charged herein was defendant's *use* of the passport in the Eastern District of New York.

in New York with Burnett making final arrangements for conducting a ski trip which they were running through the Emilio Ski Agency in Forest Hills. According to Burnett, Waters was with him in New York on both January 15 and January 19, 1979—not in Frankfurt, Germany.

POINT I

The evidence was insufficient to support Defendant's convictions in the absence of, *Inter Alia,* proof of Defendant's presence in the Judicial District and actual use of a fraudulently procured passport.

The independent nonhearsay evidence of Waters' direct conspiratorial involvement herein was less than overwhelming. The only evidence to tie him either directly to the conspiracy proper or inferentially to the use of a fraudulently procured passport was the testimony of Salah Dalki, an admited narcotics trafficker and perjuror wanted by Jordanian, German and American authorities. No direct independent evidence was introduced corroborating either that Waters used the passport at Kennedy Airport, that he boarded the flights between New York and Frankfurt or, indeed, that he was even present in Frankfurt *at all.*

In the first place, it is significant that there is no direct independent corroborative proof that Waters either went to Germany on the dates and times alleged or that he either (a) utilized a fraudulently procured passport, (b) boarded any flight between New York and Frankfurt or (c) had any direct nexus with the three women intercepted at the airport or, for that matter, had any direct nexus with the Eastern District *at all.*

Customs Officer Nolan testified merely to having met a Pan American flight arriving at Kennedy Airport from Frankfurt on January 21, 1979 and having intercepted two passengers—Mary Louise Edwards and Cynthia Conway.

While customs records reveal that among the passengers listed was a James Elder, Jr., Officer Nolan did not interview him, had no specific recollection of him and could not directly state that Waters either was Elder, had used his passport or, for that matter, was even present at the airport.

Similarly, Pan American plane reservation records merely indicated that a James Elder was listed on the passenger manifest for the flight from New York to Frankfurt on January 17, 1979. There was no indication on their records whether James Elder actually flew to Frankfurt, who may have flown in Elder's stead or, for that matter, when he returned from Frankfurt. Nor did hotel records in Frankfurt so much as list the registration of a James Elder, Jr.*

The Government thus presented no direct corroborative evidence that John Waters either was in Germany during the time periods alleged by Dalki nor that he ever even boarded a flight at Kennedy Airport nor, for that matter, that he was even present in the Eastern District of New York during the operative period of the conspiracy.

As has been stated on innumerable occasions, it is to be noted that the Government had the burden of proving proper venue of the offense and must do so by a preponderance of the evidence. *United States* v. *Leong,* 536 F. 2d 993, 996 (2d Cir. 1976); *United States* v. *Hopkins,* 529 F. 2d 775, 777 (8th Cir. 1976); *United States* v. *Jenkins,* 510 F. 2d 495, 498 (2d Cir. 1975). *See also, United States* v. *Kampiles,* 609 F. 2d 1233, 1238 (7th Cir. 1979); *Cf. United States* v. *Durades,* 607 F. 2d 818 (9th Cir. 1979).

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* Indeed, the testimony from the passoprt adjudicator indicated merely that a passport had been *issued* in the Southern District of New York to a James Elder, Jr. on January 15, 1979. There is no indication in the testimony that the passport actually was *used*—either in the Eastern District of New York or elsewhere.

Here, the record plainly reveals no direct proof that John Waters was ever present in the Eastern District of New York nor that he necessarily even passed through it allegedly on his way to Germany. The independent non-hearsay proof adduced by the Government merely served at most to indicate that a James Elder may have been on board Pan American Flight No. 73 from New York to Frankfurt. No direct proof was adduced that James Elder was John Waters other than the testimony of Salah Dalki, an accomplice witness whose perjury and substantial motives to fabricate Waters' involvement in order to extricate himself from culpability already have been detailed *ante.*

As the Government conceded at trial, Waters was not being charged herein with *procuring* a passport fraudulently.* Rather, for venue reasons, he was being charged merely with *utilizing* a fraudulently procured passport—an altogether different offense.

The relevant statute—18 U.S.C. § 1542—provides in pertinent part:

* * *

> Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—shall be fined . . . or imprisoned . . . or both.

The proof presented by the Government simply failed to establish beyond reasonable doubt that it was John Waters who actually utilized the Elder passport for foreign travel through the Eastern District. At most, and viewing

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* In light of the fact that the Passport Office was located in the Southern District of New York, Waters obviously could not be charged with fraudulent procurement for venue reasons. Rather, he was charged with *use* of a fraudulently procured passport.

the evidence in the light most favorable to the Government (*Glasser* v. *United States*, 315 U.S. 60 (1942)), the Government may have proven that someone listed as James Elder may have traveled between New York and Franfurt and that James Elder's passport may have been utilized for such travel. This, however, falls far short of proof beyond reasonable doubt that John Waters utilized the Elder passport and traveled through the Eastern District of New York. Mere fraudulent procurement of the passport is not sufficient. Rather, the Government must prove conclusively that it was Waters who actually used the passport in the Eastern Disrict. *United States* v. *Gabriner*, 571 F. 2d 48 (1st Cir. 1978); *United States* v. *Valot*, 625 F. 2d 308 (9th Cir. 1980); *United States* v. *Wasman*, 484 F. Supp. 54 (S.D. Fla. 1979).

Under these legal standards, it is clear that Dalki's inherently suspect testimony—standing along—and, indeed, plainly uncorroborated by the independent nonhearsay evidence—is clearly insufficient upon which to convict John Waters either for participation in the conspiracy proper in the absence of any competent independent nonhearsay evidence demonstarting Water's affirmative participation in the conspiracy (or acts in furtherance thereof) or his direct presence in the Eastern District through the alleged use of a fraudulently procured passport.

POINT II

The Government's use of telephone conversations wiretapped by West German authorities in violation of Title III and the Fourth Amendment should have been suppressed.

At trial, the Government introduced into evidence a tape recorded conversation made on March 20, 1979 from the telephone of one Mohamed Dalki (Salah Dalki's brother) in Wiesbaden, West Germany in which it was claimed that

defendant John Waters allegedly was a party. It was alleged by the Government that this telephone conversation was intercepted by German authorities pursuant to a wiretap placed on the telephone of Dalki, ostensibly by German authorities and ostensibly in compliance with German law relative to the electronic interception of telephone communications in Germany.

It is respectfully submitted that the Government failed to make a sufficient showing by clear and convincing evidence that any conversation procured by such eavesdropping was in lawful compliance under both applicable American law (the Fourth Amendment as well as 18 U.S.C. § 2510 *et seq.*) as well as the law of the forum in which such electronic eavesdropping occurred (the Federal Republic of Germany). In addition, it is submitted that the Government failed to sufficiently demonstrate that, even if the electronic surveillance engaged in herein was lawful under the law of the extra-territorial forum in which it was procured (i.e., the Federal Republic of Germany), that there was no direct or indirect participation in such surveillance by American authorities such as would trigger application of either the Fourth Amendment or 18 U.S.C. § 2510 *et seq.* in order to evaluate the legality of such surveillance. Absent such a showing, the fruits of such eavesdropping must be suppressed and their utilization at the instant trial forbidden.

With regard to the Constitutional rights that are retained by United States citizens whether or not they are within the confines of the continental United States, this Court definitively resolved the question of the extent to which the constitution restrains and cor rols the activities of United States law enforcement authorities acting abroad.

In *Reid* v. *Covert*, 354 U.S. 1 (1957), the defendant, wife of a U. S. serviceman stationed overseas, had been brought to trial before a military tribunal there. She argued that

a military trial violated the Fifth and Sixth Amendments, and the Supreme Court agreed, pointing out:

> "At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. *The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitation imposed by the Constitution.* When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."
>
> *Reid* v. *Covert, supra,* at 5-6.
> (Emphasis Added)

Citing *Best* v. *United States,* 184 F. 2d 131 (1st Cir. 1950), with approval, the Court went on to extend the ambit of its holding to include all the protections of the Bill of Rights:

> "This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are 'fundamental' protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of 'Thou shalt nots' which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. *Reid* v. *Covert, supra,* at 8-9 (footnotes omitted)

More recent cases have continued the crystalization of this general principle of law. In *Powell* v. *Zuckert,* 366

F. 2d 634 (D. C. Cir. 1966) and *Saylor* v. *United States*, 374 F. 2d 894 (Ct. of Claims 1967) it was held that civilian employees of the military could not be discharged on the basis of evidence secured in searches and seizures conducted by U. S. authorities abroad in contravention of the Fourth Amendment. In *Powell*, Air Force agents and Japanese officers co-operated in the search of appellant's private residence located near but not within the confines of Fuchi Air Station, Japan. The search was conducted pursuant to a general warrant apparently vaild under Japanese law, but clearly invalid under the Fourth Amendment of the United States Constitution. Applying the principles enunciated in *Best* v. *United States* and *Reid* v. *Covert*, the court rejected the Government's contention that the evidence seized as a result of the search was properly admitted in discharge proceedings against appellant:

> "The Government's position is that the search was made lawful by paragraph 6(a), Article XVII, Agreement under Article VI of the Treaty of Mutual Cooperation and Security, 11 U.S.T. 1665, which provides:
>
> > 'The military authorities of the United States and the authorities of Japan shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense.'
>
> This, appellee contends, made lawful the presence of Air Force agents 'as observers during the execution of a valid Japanese search warrant for appellant's off-base resident.' 'The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.' *Reid* v. *Covert*, 354

> U.S. 1, 16, 77 S. Ct. 1222, 1230, I L. Ed. 2d 1148 (1957) (opinion of Black, J.). And in any case, the record conclusively demonstrates that OSI agents requested the search and actually conducted it."
> *Powell* v. *Zucket, supra,* at 640.

Holding the fruits of a similar search inadmissible in *Saylor,* the Court of Claims pointed out:

> "These cases (Reid v. Covert, supra, and Powell v. Zuckert, supra), and others, show that we have passed beyond the argument that the Fourth Amendment has no applicability at all overseas. See also, Best v. United States, supra, . . ." *Saylor* v. *United States* supra, at 900, n.7.

Indeed, even where searches are conducted by local authorities in a foreign country, the extent of American participation is relevant when the fruits are sought to be introduced against a defendant in an American court. Thus, in *Stonehill* v. *United States,* 405 F. 2d 738 (9th Cir. 1969), the Government sought to foreclose several federal tax liens, and introduced into evidence a number of documents which had been seized at the defendant's business premises in the Philippines during the course of a search by Philippine authorities. The defendant appealed on the ground that the search was illegal under both the Philippine Constitution and the Fourth Amendment of our own Constitution. The court affirmed the foreclosure and the denial of defendant's suppression motion, but only because it found that Government agents did not substantially participate in the search.

> "Neither the Fourth Amendment of the United States Constitution nor the exclusionary rule of evidence, designed to deter Federal officers from violating the Fourth Amendment is applicable to the acts of foreign officials . . . (But) the Fourth Amendment could

> apply to raids so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials."
> *Id.* at 743.

Although the Fifth Circuit, in *Birdsell* v. *United States* 346 F.2d 775 (5th Cir. 1965), also found a lack of United States participation in the search of an automobile in Mexico by Mexican authorities, it significantly added to the thrust of *Best* v. *United States and Reid* v. *Covert.* Sitting by designaion, Judge Friendly indicated in his majority opinion that even if agents of the United States do not actually participate in searches conducted by foreign authorities, the fruits thereof might nevertheless be subject to exclusion if U.S. agents induce foreign officals to engage in conduct which "shocked the conscience."

> "We do not mean to say (in holding that the fruits of the search in the present case were properly admitted) that in a case where federal officials had induced foreign police to engage in conduct that shocked the conscience, a federal court, in the exercise of its supervisory power over the administration of federal justice might not refuse to allow the prosecution to enjoy the fruits of such action."
>
> *Birdsell* v. *United States, supra,* at 782, n.10.

See, also, *United States* v. *Callaway,* 446 F.2d 753 (3rd Cir. 1971); *United States* v. *Nagelberg,* 434 F2d 585, 587 (2d Cir. 1970); *United States* v. *Shea,* 436 F.2d 740, 741 (9th Cir. 1970; *Brulay* v. *United States,* 383 F.2d 348 (9th Cir. 1967).

The few American courts that have considered the question of how much American participation in a foreign search and seizure is required to mandate application of the exclusionary rule have not been unanimous in their choice of the precise test to be applied requiring the appropriate quantum of American participation required to

trigger Fourth Amendment quarantees. *Compare, Birdsell* v. *United States,* 346 F.2d 775, 782 (5th Cir. 1965) ("cooperation to some extent") with *Stonehill* v. *United States,* 405 F.2d 738, 743 (9th Cir. 1968) ("substantial participation") *see generally, United States* v. *Morrow,* 537 F.2d 120, 138 (5th Cir. 1976).

However, in at least one jurisdiction, the United States Court of Military Appeals has held that it is incumbent upon the Government to demonstrate that a challenged search is legal under the law of the country where it takes place. *United Sates* v. *Jordan,* 24 U.S.C.M.A. 156, 51 C.M.R. 375 (1976).*

Clearly, then, at the very least, before the fruits of any foreign wiretaps may be admissible at any American trial, they must meet an appropriate tripartite test. First, the electronic surveillance must meet both American statutory standards and the applicable statutory standards of the foreign jurisdiction in which such electronic surveillance was engaged in, *Berlin Democratic Club* v. *Rumsfeld,* 410 F.Supp. 144, 153-58 (D.D.C. 1976). Secondly, such surveillance involving American citizens (including those intercepted) must satisfy appropriate Fourth Amendment safeguards where there is *any* degree of American participation in the surveillance or where American agents actively seek to exploit the fruits of such surveillance. *Best* v. *United States; Reid* v. *Covert, supra.* Finally conduct either by American *or* foreign agents must not approach the "conscience shocking" standard in the procurement of such evidence condemned by the Second Circuit in *United States* v. *Toscannio,* 500 F.2d 267 (2d Cir. 1974) and its progeny (e.g., *United States ex. rel Lujan* v. *Gengler* 510 F.2d 62 (2d Cir. 1975); *United States* v. *Lira,* 515 F.2d 68 (2d Cir. 1975). *See, also, Stowe* v. *Devoy,* 588 F2d. at 341-42.

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* This precise question has not specifically been answered by the Second Circuit's most recent consideration of the question. *Stowe* v. *Devoy,* 588 F.2d 336, 341 *passim* (2d Cir. 1978).

Applying these principles to the facts at bar, it is manifest that, pursuant to 18 U.S.C. § 3504(1), he Government failed to demonstrate conclusively not merely that the wiretaps here involved were lawfully secured both under 18 U.S.C. § 2510 (and its progeny) as well as under German law, but that such surveillance was in compliance both with the Fourth Amendment and the due process ("conscience shocking") standards of *Rochin* v. *California*, 342 U.S. 165 (1952) and *United States* v. *Toscanino, supra.*

While it is true that the Government tendered a warrant issued by a German court, ostensibly authorizing the telephonic interception, the warrant itself fails to state that no other surveillance or investigation technique would be satisfactory to conduct the instant investigation—a necessary requisite under the Fourth Amendment and Title III. Quite the contrary, the warrant stated exactly the opposite —that other investigatory means are available, but this is simply mere convenience. Accordingly, it is clear that absent satisfactory compliance with 18 U.S.C. § 3504(1), the Government should have been prevented from introducing the March 20 telephone conversations intercepted from the contested German telephonic wiretap as well as the evidentiary fruits derived therefrom.

Conclusion

The petition for a writ of Certiorari should be granted.

Dated: New York, New York
December 24, 1981

Respectfully submitted,

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APPENDIX

Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eight day of October, one thousand nine hundred and eighty-one.

Present: HONORABLE LEONARD P. MOORE,
HONORABLE JON O. NEWMAN,
Circuit Judges.

HONORABLE CHARLES H. TENNEY,*
District Judge.

United States Court of Appeals
Second Circuit
Filed
Oct 28 1981
A. Daniel Fusaro, Clerk
81-1148

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN WATERS,
Defendant-Appellant.

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix

ORDER

This is an appeal from a judgment of conviction entered on April 3, 1981 in the Eastern District of New York (Jacob Mishler, Judge), following a jury verdict finding defendant John Waters guilty of conspiracy to import narcotics in violation of 21 U.S.C. § 963 (1976) and of use of a passport obtained by false statement in violation of 18 U.S.C. § 1542 (1976). On appeal, defendant challenges the sufficiency of the evidence to convict him and the admissibility of tape recorded telephone conversations obtained in Germany by German court-ordered wiretap. Finding no merit in defendant's contentions, we affirm the judgment of conviction.

1. Waters attacks his conviction on the conspiracy count by contending that the Government failed to establish venue in the Eastern District of New York because it offered insufficient proof of his presence there during the life of the conspiracy. He attacks his conviction on the passport count by contending that there was insufficient proof that he ever actually *used* the passport. The same evidence, ample to support a jury verdict of guilty, defeats both contentions. Having shown that the passport was falsely obtained, the Government was required to show that it had been used in the Eastern District. This the Government did: an airline manifest indicated that "James Elder, Jr.," the name under which Waters obtained his passport, flew from Kennedy Airport to Germany on January 17, 1979; the Government's chief witness testified that he met with Waters in Frankfurt during that trip; a U.S. Customs declaration in the name of James Elder, Jr. showed that Waters returned to the United States through Kennedy Airport on January 21, 1979; testimony established that all international passengers arriving in the

United States during that month were required to present their passports with their Customs declarations; and it was stipulated that Waters had never applied for a United States passport in his own name. This evidence, establishing both that Waters used the passport and that he used it in the Eastern District of New York, was sufficient to support the jury's verdict on the § 1542 count and to establish venue in the Eastern District.

2. Waters also asserts that a tape recorded transatlantic telephone conversation between him and the Government's chief witness, Salah Dalki, was improperly admitted into evidence. He contends that to be admissible, the recordings must have been obtained in accordance with both German and American law, and that the Government failed to make a sufficient showing on this issue. The Government sufficiently proved compliance with German law by the court order authorizing the wiretap, the documents submitted by the German police in support of the order, and testimony from a German police officer as to the circumstances of the tap. Waters offered nothing in rebuttal. As to the claimed requirement that the tap also comport with American law, Waters asserts, without support, that a foreign wiretap on an American citizen must meet the requiremets of the federal wiretap statute, 18 U.S.C. § 2510 (1976), at least when American agents may have been involved in obtaining the tap. Waters also asserts that involvement of American agents in obtaining a foreign wiretap triggers application of the Fourth Amendment. Both arguments are defeated by the Government's uncontradicted testimony that no American agents participated in obtaining the tap. Moreover, we have ruled that § 2510 has no extraterritorial effect. *Stowe* v. *Devoy*, 588 F. 2d

336, 341 (2d Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *United States* v. *Cotroni*, 527 F. 2d 708, 711 (2d Cir. 1975), *cert. denied*, 426 U.S. 906 (1976). Finally, the Fourth Amendment places no limits on the actions of the German government on German soil.

Affirmed.

LEONARD P. MOORE
JON O. NEWMAN
Circuit Judges.

CHARLES H. TENNEY
District Judge.